IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 906 OF 2005

Appa @ Prakash Haribhau Londhe]
age 52 years, residing at Urali]
Kanchan, Sindavane Road, Taluka]
Haveli, Dist : Pune (at present]
Yerwada Prison)]..Petitioner

versus

1. State of Maharashtra]
(copy to be served on the]
Public Prosecutor, High Court]
Bombay)]
2. Superintendent of Police]
Pune (Rural), Dist : Pune]..Respondents

AND

CRIMINAL WRIT PETITION NO. 1644 OF 2005

Uttam Ramchandra Hole]
aged about 53, Occ: Business]
residing at Hadapsar,]
Pune 411 028]
presently detained as an under]
trial prisoner lodged in]
Yerawada Central Prison, Pune]
and now stands admitted to the]..Petitioner
Hospital in Mumbai](Ori. Accused)

versus

1. The State of Maharashtra]
(copy to be served on Public]
Prosecutor, High Court, Bombay]

2. Deputy Superintendent of]
Police, Haveli Division, Pune]
(Rural)]..Respondents

Mr. P. M. Pradhan for the Petitioners.

Mr. S. R. Borulkar, P.P. and Mr. D. S. Mhaispurkar, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
S. A. BOBDE,JJ.

DATE : 24TH JULY, 2006

ORAL JUDGMENT (Per. D. G. Deshpande, J.) :

1. Heard learned counsel for the petitioners and learned P.P. and A.P.P. for the Respondents - State.

2. The Petitioners have challenged by these petitions the applicability of the Maharashtra Control of Organized Crime Act, 1999 (for short "MCOC Act"). The main grievance of the petitioners is that on the date when MCOC Act was applied they had not committed any offence and there was nothing before the Competent Authority to come to the conclusion that the petitioners were indulging in continuing unlawful activity, and, therefore, it was totally wrong and illegal to apply MCOC Act, to them.

3. Mr. Pradhan drew our attention to certain provisions of MCOC Act, viz. Section 2 (d), (e) (f). The same reads as under:

> **"(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;**
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> **(e) "organized crime" means any continuing unlawful activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or intimidation or coercion, or other unlawful means, with the objective of gaining pecuniary benefits, or gaining undue economic or other advantage for himself or any other person or promoting insurgency;**
>
> **(f) "organised crime syndicate" means a group of two or more persons who, acting either singly of collectively, as a syndicate or gang indulge in activities of organised crime;**

Then, also to the provisions of Section 3 regarding punishment under Chapter II of the said Act.

4. Mr. Pradhan laid emphasis on the three definitions of the words "continuing unlawful activity", "organised crime" and "organised crime syndicate". According to him there was nothing with the Authorities to come to the conclusion that the petitioners were indulging in continuing unlawful activity. Secondly, there was no primafacie evidence to show that they have undertaken either singly or jointly such activities. Further, there was no evidence that any charge sheet in respect of such offence was not filed against them, and, therefore, the order of applying MCOC Act to the petitioners, was totally wrong.

5. Mr. Pradhan further contended that MCOC Act came into force in 1999 and offences prior to 1999 cannot be and could not have been taken into consideration. According to him, they are stale offences and because a man has committed offence in past but when he has ceased to do any kind of any illegal activities, MCOC Act cannot be made applicable to him. Mr. Pradhan contended that it past incidents are permitted to be made a subject of new offence, then there would not be opportunity for offender to improve or change the course of his

illegal activities and become a law abiding citizen. Mr. Pradhan drew our attention in this regard to certain authorities. One of them was a judgment of **Division Bench of this Court (R.M.S. Khandeparkar and P. V. Kakade, JJ) in group of Criminal Writ Petitions from Criminal Writ Petition Nos. 689 of 2005 and others.** Question involved in that case appears to be "Whether a person can be subjected to criminal proceedings under a particular statute which defines the act committed by such persons to be offences punishable thereunder" that will depend upon the facts as to whether the said law has been in force or not at the time when the acts complained of are committed by concerned person. In the said judgment the Division Bench has held :

> **"Therefore, "commission of cognizable offence" is the essence of FIR. Moment commission of cognizable offence is recorded, the police are bound to investigate in view of the provisions of law comprised under Section 157 read with Section 154 of the Code. The law on this point is well settled by the decision of the Apex Court in Bhajan Lal's case. There can be no investigation without FIR and there can be no FIR without cognizable offence being disclosed." Similarly, there can be no FIR under the MCOC Act unless there being commission of offence under the MCOC Act is disclosed".**

Then in paragraph 38, the Division Bench has

observed:

> **"The fall out of the above discussion is that it is to be held that in the absence of material about commission of the offence under the MCOC Act by the petitioners on or after 24th February, 1999, the authority could not have granted the approval for recording FIR under the MCOC Act, nor there could have recorded the FIR under the MCOC Act for the alleged activities, unless the activities were done on or after 24th February, 1999."**

The Division Bench, partly allowed the petitions and the approval granted under Section 23(1)(a) of the MCOC Act for recording of FIR in relation to the said mal practices at the September 1998 examination, i.e. before the MCOC Act came into force, and the FIR No. 6 of 2005 so far as it relates to the offences under the MCOC Act is concerned, were quashed and set aside.

6. Mr. Pradhan also relied upon another judgment of this Court reported in **[2003(3) Mh.L.J. 866 Jaisingh s/o. Asharfilal Yadav and others vs. State of Maharashtra and Another.** In this matter petitioner had challenged constitutionality of the provisions of law contained in MCOC Act, that is, declaring the acts prior to its enforcement of the offences under the Act as being violative of Article

20(1) of the Constitution of India. Since constitutional validity was in question, Advocate General was noticed and heard. The challenge of the petitioners revolve around the phrase **"preceding period of ten years"** in the definition clause 2 (d) of the term **"continuing unlawful activity"**.

7. Our attention was also drawn, in particular, by Mr. Pradhan to paragraphs 18, 19 and 20 of the said judgment. Paragraphs 18, 19 and 20 of the said Judgments, reads as under:

> **"18. Referring to the statute under consideration in the case in hand, neither the definition of the term "organised crime" nor the term "continuing unlawful activity" nor any other provision therein declares any activity performed prior to 24-2-1999 to be an offence under the said Act nor the punishment provision relates to any offence prior to the date of enforcement of the said Act. Yet by referring to the expression 'preceding period of ten years' in section 2(d) which is a definition clause of the term "continuing unlawful activity" inference is sought to be drawn that in fact it takes into its ambit the acts done prior to the enforcement of the said Act as being offences under the said Act.**
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> **19. There is lot of difference between the act or activity itself being termed or called as an offence under a statute and such act or activity being taken into consideration as one of the requisites for taking action under the statute. The former situation has to satisfy the mandate of Article 20(1) of the Constitution; however,**

in case of latter situation, it stands on totally different footing. Undoubtedly, for the purpose of organised crime there has to be a continuing unlawful activity. There cannot be continuing unlawful activity unless at least two charge-sheets are to be found to have been lodged in relation to the offence punishable with three years' imprisonment during the period of ten years. Undisputedly, the period of ten years may relate to the period prior to 24-2-1999 or thereafter. In other words, it provides that the activities which were offences under the law in force at the relevant time and in respect of which two charge-sheets have been filed and the Court has taken cognizance thereof, during the period of preceding ten years, then it will be considered as continuing unlawful activity on 24-2-1999 or thereafter. It nowhere by itself declares any activity to be an offence under the said Act prior to 24-2-1999. It also does not convert any activity done prior to 24-2-1999 to be an offence under the said Act. It merely considers two charge-sheets in relation to the acts which were already declared as offences under the law in force to be one of the requisites for the purpose of identifying continuing unlawful activity and/or for the purpose of an action under the said Act. This by itself cannot be said to be in any manner violative of the mandate of Article 20(1) considering the law laid down by the Apex Court in Rao Shiv Bahadur Singh's case as well as in Sajjan Singh's case.

20. As regards the second submission pertaining to the reading down of Section 2(d) in relation to the expression 'preceding period of ten years' to be effective or to commence from 24-2-1999, if accepted virtually amounts to reading something in the said provision of law which is not intended by the Legislature, and thereby it would virtually amount to defeat the very purpose of the said Act itself, apart from the fact that it is settled law

that once the contention about unconstitutionality of the provision of law is rejected, question of reading down the same provision does not arise. The Apex Court in Electronics Corporation of India Ltd. and others vs. Secretary Revenue Department, Government of Andhra Pradesh and others reported in (1999) 4 SCC 458 has held that " the question of reading down comes in if it is found that the provisions are ultra vires as they stand. We have held that these provisions are not ultra vires because Article 285 does not apply when the property that is to be taxed is not of the Union of India but of a distinct and separate legal entity." Similarly, in K. G. Ashok and others, vs. Kerala Public Service Commission and others reported in (2001) 5 SCC 419, wherein though the candidates had applied for selection in more than one district, they could appear only in one district in view of the fact that the test was conducted in all the districts on one day, it was sought to be contended that the rule restricting filing of application for one district incorporated in Note 2 of the notification should be read down in its application to the cases of the appellants in those appeals before the Apex Court, while rejecting the said contention, it was ruled that "the submission has been made only to be rejected as in the present case we have already held that the aforesaid restriction contained in Note 2 is not violative of Article 14 of the Constitution. Therefore, the question of reading down the same does not arise." The very fact that the expression used in the section 2(d) contains the word 'preceding' knowing well that the Act has to come into force from 24-2-1999, it is apparent that it has to relate to the period even prior to 24-2-1999. Undoubtedly, had it been directly related to declaring any act as an offence under a present Act prior to the date of enforcement of the said Act, certainly it would have been in violation of the mandate of Article 20(1) of the Constitution. However, as already observed above, the period specified

> **in section 2(d) of the said Act relates to merely one of the requisites to consider whether the activity is a continuing unlawful activity or not for the purpose of taking action under the said Act and being so, applying the law laid down by the Apex Court in Rao Shiv Bahadur's case and Sajjan Singh's case the same cannot be held to be in any manner violative of Article 20(1) of the Constitution."**

8. On the other hand, the learned P.P. showed to us the FIR that was registered against the petitioners and others. He also relied upon judgment of the **Division Bench of this Court reported in 2003 All MR (Cri) 1061 Bharat Shantilal Shah vs. State of Maharashtra**. In that case also challenge was to the constitutional validity of MCOC Act. The learned APP drew our attention to paragraph 25 of the said judgment. Paragraph 25 reads as under:

> **"25. Then we would consider the submission of Shri Manohar that the definition of continuing unlawful activity violates the mandate of article 14 and is therefore liable to be struck down. According to the learned counsel unequals are being treated as equals. Persons charged only once are not brought within the purview of the Act but a person with several charges framed and cognizance taken by competent court who later on are acquitted are covered by the definition. According to him therefore a person is acquitted of ten charges cannot be treated as equal to a person who is charged and convicted of only one offence. In our**

> **opinion, there is no violation of article 14 by this definition. If we read the definition again, what has been defined as continuing unlawful activity is a member of organized crime syndicate in respect of which any activity prohibited by law and done repeatedly i.e. more than once for which charge sheet has been filed in the court of competent jurisdiction in the past ten years. The purpose of definition is to define what continuing unlawful activity is and it is for the purposes of defining what is continued unlawful activity that those charges are to be taken into consideration. Mere taking into consideration of such charges cannot result in discrimination of the kind alleged by Shri Manohar. The activity must be continuing unlawful activity and to define it with clarity it is provided that any person who in the past was charge sheeted for more than one charge of such activity or crime the cognizance of which has been taken and imprisonment for which is more than three years should be taken into account. The fact of the person having been charge sheeted in such cognizable offences in the past makes the unlawful activity, continuing unlawful activity. This section only defines what the activity is. It does not itself provide for any punishment for that activity. Had punishment been provided the submission that it treats while punishing unequals as equals may carry weightage. That being not the case in the challenge to section 2(1)(d) of the Act we see no vagueness or violation of article 14 by the definition. We find that the provision treats all those covered by it in a like manner and does not suffer from the vice of class legislation."**

Both the cases relied upon by Mr. Pradhan, are of no help to him because of the peculiar facts of these cases.

9. Mr. Borulkar, the learned P.P. had given to us a copy of the FIR under the provisions of MCOC Act. In that FIR list of offences committed by the petitioners and others who are members of his gang have been given. So far as Petitioners are concerned, offences against them start from 1996. The offence at Sr. No. 5 is C. R. No. 274 of 1999, this is followed by C.R. No. 198 of 2002, followed by C.R. No. 204 of 2003 and 208 of 2003. It may be that for offences committed by the petitioners prior to 24.2.1999 i.e. when the MCOC Act came into force, cannot be made the basis for FIR in the light of observations of the Division Bench of this Court (R.M.S. Khandeparkar and P. V. Kakade, JJ) in group of Criminal Writ Petition No. 689 of 2005 and other Writ Petitions, but when it is clear that after 24.2.1999 also the petitioners have committed offences (the actual date of commission of offence in C.R. No. 274 of 1999 is not given in FIR at least in the Schedule), then it cannot be said that no offences are committed after MCOC Act came into force, and, if that is so, then there is a material to come to the conclusion that the petitioners were engaged in continuing unlawful activity; the offences committed by them were

organised crime and there was organized crime syndicate. At any rate, the Petitioners in both the petitions were members of organised crime syndicate or organised crime, because being a member is itself made punishable under Section 3 sub section 4 of MCOC Act. As rightly held by this Court in the judgment reported in [2003(3) Mh.L.J. 866 **"...Yet by referring to the expression 'preceding period of ten years' in section 2(d) which is a definition clause of the term "continuing unlawful activity" inference was sought to be drawn that in fact it takes into its ambit the acts done prior to the enforcement of the said Act as being offences under the said Act."**

10. For the purpose of organised crime there has to be a continuing unlawful activity and there cannot be continuing unlawful activity unless at least two charge sheets are to be found to have been lodged in relation to the offence punishable with three years imprisonment during the period of ten years. If no illegal activities as contemplated by MCOC Act are committed after 1999, then the past activities prior to 1999 may not be of any help for registering any FIR only on the basis of those past

activities as has been observed by the **Division Bench (R.M.S. Khandeparkar and P. V. Kakade, JJ) of this court in Writ Petition No. 689 of 2005 and other petitions,** but if two or more illegal activities are committed after 1999, then the past activities can be taken into consideration in order to show the continuity. We are therefore not in agreement with the submissions made by Mr. Pradhan that on the date of registration of FIR against the petitioners they had not committed any act, as contemplated.

11. Learned P.P drew our attention to the judgment of the **Single Bench of this Court (A. M. Khanwilkar, J) dated 3.11.2004 in Criminal Application Nos. 3978 and 3979 of 2004 Anil Umrao Gote vs. State of Maharashtra)**, and particularly **to** the following portion of paragraph 6:

> **"6. ...However, what has been overlooked is that the offence under the MCOCA is not an independent offence, but going by the relevant provisions of the Act, it would necessarily follow that any activity, which is a continuing unlawful activity by an individual singly or jointly either as**

> **member of the organised crime syndicate or on behalf of such syndicate, which is a cognizable offence punishable with imprisonment of three years or more, in respect of which more than one charge sheet have been filed before the competent Court within the preceding 10 years and that Court has taken cognizance of such offence, such successive unlawful activity by itself becomes an organised crime. In other words, the singular unlawful activity would attract the provisions of ordinary law, but if it is continuing one, and, to wit, third offence of specified type which fulfils the requirement of provisions of the Act, it becomes an organised crime to be registered as an offence under the MCOCA. In such a situation, there are two options available to the police, either they can separately record information about the commission of an offence of organised crime under the Act after successive unlawful activity of the specified type are reported to have been committed, by or for and on behalf of organised crime syndicate; or invoke the provisions of the said enactment to the unlawful activity already reported, which is the successive in point of time."**

It is to be noted here from the copy of the FIR given that C.R. No. 70 of 2004 is the C.R. under the MCOC Act. In the FIR details of all the activities prior to 1999 and after 1999 have been given showing the continuous chains, link of events fulfilling the requirement of the organized crime or organised crime syndicate or continuing unlawful activities.

12. This is the only submission made by Mr. Pradhan, and, for the aforesaid reasons, the same is

required to be rejected. Therefore both the Petitions fail, both the petitions are dismissed along with pending applications therein. Rule discharged in both the Petitions.

(D. G. DESHPANDE, J.)

(S.A. BOBDE, J.)